No. 15,350

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, his wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING AND FOR REHEARING EN BANC.

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Petitioners, Appellants herein, respectfully submit that the opinion rendered by this Court in the above matter is erroneous in the particulars hereinafter stated and respectfully pray that a rehearing be granted and further that said rehearing be en banc, for reasons hereinafter set forth.

I.

THE OPINION REPEATEDLY AND IN FIVE INSTANCES REFERS TO THE SUBJECT AND COMPASS OF THE REGULATION AS A "LOBBYING" REGULATION. THE OPINION, HOWEVER, ERRONEOUSLY CONCLUDES THAT THE INSTANT EXPENDITURES WERE FOR LOBBYING AND HENCE FALL WITHIN THE VALID APPLICATION OF THE REGULATION.

The italics in the quotations from the opinion hereafter quoted are ours. The full text of the opinion is set forth in the Appendix.

At page 2, last paragraph, line 1, the opinion states: "the field encompassing the force and effect of the *lobbying regulation* set out above . . ."

At page 3, first paragraph, line 9, the opinion states: ". . . the ban against deductions of amounts spent for *lobbying* as ordinary and necessary expenses is valid . . ."

At page 3, f.n. 4, line 5, the opinion states: "The Court there related the *lobbying regulation* to ordinary and necessary business expenses . . ."

At page 4, first paragraph, line 8, the opinion states: ". . . that the *lobbying regulation* was inapplicable to ordinary business expenses . . ."

At page 5, f.n. 5, line 1, the opinion states: "The *lobbying regulation* assumed its present form . . ."

The foregoing recurrent characterization of the scope and compass of the Regulation as a "lobbying regulation" is correct. It conforms with the interpretation and valid scope of the Regulation referred to in the *Textile* case where the Supreme Court characterized the Regulation as a "ban against deductions

of amounts spent for 'lobbying' " (314 U.S. 326, 337). It conforms with a similar interpretation which the Supreme Court subsequently placed upon the *Textile* case and the Regulation in the *Heininger* and *Lilly* cases wherein the Court referred to the interpretation of the Regulation in the *Textile* case as embracing: "expenses for certain types of lobbying" (320 U. S. 467, 473); and "certain expenditures for lobbying purposes" (343 U. S. 90, 95). It conforms with the interpretation which the Commissioner himself initially placed on the corporate Regulation in giving it the heading "Lobbying Expenses."

On the basis of the foregoing interpretation and compass of the valid application of the Regulation, the opinion then arrives at the following ultimate conclusion: "We think it may reasonably be gathered from a reading of *Textile Mills* that the Commissioner, in segregating sums paid for *lobbying* as nondeductible as ordinary and necessary business expenses, acted within the proper exercise of his rule-making power." (p. 3, first paragraph, line 16) (italics ours).

That conclusion in the light of the clearly stated and constantly repeated premise of the opinion—that the Regulation is a "lobbying regulation"—is incorrect because: the instant expenditures were not for "lobbying."

"Lobbying" only relates to activities with respect to matters pending in "legislative halls." The term does not embrace and apply to expenditures incurred for publicity in connection with measures voted upon by the People. In *United States v. Rumely,* 345 U. S.

41, 47 (1953) the Supreme Court clearly defined "lobbying" as only embracing " 'representations made directly to the Congress, its members, or its committees' " and as not including "attempts 'to saturate the thinking of the community' ". [See also: *United States v. Harriss,* 347 U. S. 612, 620 (1954)].

The Supreme Court's interpretation of the valid scope and application of the Regulation as a ban against "lobbying" in the *Textile, Heininger* and *Lilly* cases thus can have only one meaning according to the Supreme Court's own definition of the term: activities in connection with matters pending in "legislative halls".

It should further be noted that the opinion on page 4, fifth paragraph, line 1, by direct implication erroneously refers to the instant expenses as "lobbying" expenditures in the following language: "Those cases are distinguishable in that the regulation here involved was not applicable; there was no *lobbying* involved." (italics ours).

Thus, the opinion, in setting forth the foregoing crucial conclusion, is inconsistent on its face with the repeated premise stated in the opinion: that the compass and scope of the Regulation is "lobbying."

II.

THE OPINION IN HOLDING THAT THE REGULATION MAY BE VALIDLY APPLIED TO BAR THE INSTANT EXPENDITURES ERRONEOUSLY CONSTRUES THE LANGUAGE OF THE TEXTILE CASE WHEREIN THE COURT SAID THAT THE WORDS "ORDINARY AND NECESSARY" ARE NOT SO CLEAR AND UNAMBIGUOUS IN THEIR MEANING AS TO LEAVE NO ROOM FOR AN INTERPRETIVE REGULATION.

The opinion in referring to the *Textile* case states: "However, other language in *Textile Mills* characterizes the words 'ordinary and necessary' as used in the statute, as not being 'so clear and unambiguous in their meaning and application as to leave no room for an interpretive regulation'" (p. 3, first paragraph, line 12).

In the next sentence of the opinion (being the same sentence quoted under the previous topic) and on the basis of the foregoing statement, the opinion concludes that the Supreme Court was referring to an interpretation and application of the Regulation embracing within its compass any expenditures referred to in the Regulation *irrespective of whether such expenditures are illegal or violate public policy.*

The Supreme Court, in succeeding sentences found in the same paragraph from which the foregoing quotation was taken, clearly indicated that the Court was approving an interpretation and application of the Regulation embracing only: activities of a certain character in "legislative halls" *which are illegal or contrary to clearly defined public policy.*

Thus, the Supreme Court in the succeeding sentences in the same paragraph, in referring to two Su-

preme Court cases involving illegality, said: "The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of nondeductible expenses. There is no reason why in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. *The exclusion of the latter from 'ordinary and necessary expenses' certainly does no violence to the statutory language.*" (314 U.S. at p. 339) (italics ours).

The Supreme Court therefore clearly held that the words "ordinary and necessary" are not "so clear and unambiguous in their meaning and application as to leave no room for an interpretive regulation" by the Commissioner validly barring expenditures as a deduction where such expenditures, incurred in connection with lobbying, are *illegal or contrary to public policy,* even though Congress was silent on the subject and even though such expenditures otherwise may factually be ordinary and necessary. Thus, if the expenditures of the type referred to in the Regulation are illegal or contrary to well defined public policy they may be regarded as not being "ordinary or necessary" within the meaning of Section 23(a)(1)(A) because it cannot be presumed that business men would ordinarily incur illegal expenditures or expenditures contrary to well defined public policy even though such expenditures otherwise in fact may be ordinary and necessary.

It is clear, therefore, that the Supreme Court in the *Textile* case did not hold that the words "ordinary and necessary" are unclear or ambiguous as applied to any other expenditures within the literal language of the Regulation where such expenditures *are not illegal or contrary to public policy.*

The foregoing construction of the language used by the Supreme Court in the *Textile* case conforms with the subsequent interpretation of the *Textile* case by the Supreme Court in the *Heininger* and *Lilly* cases wherein the Court plainly stated that the holding in the *Textile* case was based upon public policy.

Only by taking the foregoing construction of the language used by the Court in the *Textile* case, can the decision in that case be squared with the subsequent emphatic statement of the Supreme Court in the *Heininger* case wherein the Court said that to hold that expenditures are not ordinary and necessary, where such expenditures are incurred in defending an existing business and existing "selling methods" and are not illegal or against public policy, "would be to ignore the ways of conduct and the forms of speech prevailing in the business world" (320 U. S. at p. 472).

Surely the same must be said of expenditures incurred by individuals in the exercise of the right of free speech and clearly in furtherance of public policy—in defending a business from the enactment of a measure which taxpayers reasonably believed would have deprived them of all their existing cus-

tomers and would have destroyed their existing "method" of selling and doing business.

Therefore, the opinion of this Court, in holding that the language of the Supreme Court previously quoted validly sanctions an interpretation and application of the Regulation so as to embrace within its compass the instant expenditures, is erroneous.

III.

THE OPINION IS ERRONEOUS IN HOLDING THAT THE APPLICATION OF THE REGULATION TO THE INSTANT EXPENDITURES HAS RECEIVED CONGRESSIONAL SANCTION BECAUSE OF A "KNOWN ADMINISTRATIVE INTERPRETATION." ON THE CONTRARY, THE KNOWN ADMINISTRATIVE INTERPRETATION ALLOWED SUCH EXPENDITURES AS A DEDUCTION. HENCE IF ANY THEORY OF STATUTORY RE-ENACTMENT IS TO BE INVOKED IT IS DIRECTLY OPPOSITE TO THAT REFERRED TO IN THE OPINION.

The opinion states (p. 4, last paragraph): "This court in Sunset Scavenger v. Commissioner, 9 Cir., 1936, 84 F.2d 453, held that the doctrine of statutory re-enactment in the face of a known administrative interpretation applied in that case. We think that doctrine can be said to apply with equal force in the instant case."

The *Sunset* case was decided in 1936. The Regulation here involved and pertaining to individuals was first issued in 1939.

In the *Textile* case, decided in 1941, the highest court in the land referred to the parallel corporate Regulation as a "ban against lobbying."

In 1944 the Commissioner publicly acquiesced in *Luther Ely Smith v. Commissioner,* 3 T.C. 696 (1944). In that case the Tax Court held deductible expenditures incurred for publicity in connection with a measure voted upon by the People affecting taxpayer's occupation as a lawyer.

It is not necessary to consider the merits of the *Luther Ely Smith* case. The point is that the Commissioner publicly acquiesced in that decision, which acquiescence has never been withdrawn. (Acquiescence 1944 Cum. Bull. 26.)

The opinion of this Court nowhere refers to the Commissioner's acquiescence in the *Luther Ely Smith* case. On the other hand, the opinion merely mentions "a known administrative interpretation" referred to in the *Sunset* case which was decided in 1936—prior to the issuance of the Regulation here in question—prior to the decision of the Supreme Court in the *Textile* case—and prior to the Commissioner's acquiescence in the *Luther Ely Smith* case.

Furthermore, the Commissioner on the basis of his acquiescence in the *Luther Ely Smith* case, thereafter and until the *Cammarano* case, allowed the beer industry to deduct expenditures for publicity incurred in connection with measures submitted to a vote of the People. The practice was evidenced by private rulings of the Commissioner in letter form.

This Court erroneously refused to take judicial notice of such written communications. The Supreme Court of the United States, however, has held di-

rectly to the contrary. In *Jones v. United States,* 137 U. S. 202 (1890), the Supreme Court held that a Federal District Court had the power to take judicial notice of unpublished letters between the Secretary of State and various private persons. [And See: *American Legion Post No. 90 v. First Nat. Bk. & T. Co.,* 113 F.2d 868, 872 (2d Cir. 1940)].

In the face of the Commissioner's published acquiescence in the *Luther Ely Smith* case, which took place subsequent to the decision in the *Textile* case and therefore indicates the Commissioner's own interpretation of that case and the Regulation, and in view of the Commissioner's own practice in allowing the beer industry to deduct such expenditures until the advent of the *Cammarano* case, how then can the opinion under any theory of statutory re-enactment impute to Congress knowledge of an administrative interpretation which is directly contrary to the fact?

IV.

THE OPINION IS IN ERROR: IN HOLDING THAT THE LOWER COURT IN FINDING NO. 9 FOUND THAT THE APPELLANTS FAILED TO SUSTAIN THE BURDEN OF PROOF THAT THE INITIATIVE WOULD HAVE IMPAIRED THEIR BUSINESS AND FURTHER IN HOLDING THAT THE BURDEN OF PROOF OF DEDUCTIBILITY UNDER LAW IS CONFINED TO PROOF AND A FINDING THAT THE BUSINESS WOULD HAVE BEEN IMPAIRED. SUCH A FINDING HAS NO LEGAL SIGNIFICANCE AND IS ERRONEOUS BECAUSE THE ONLY OTHER ISSUE WHICH THE COURT COULD FIND, ASIDE FROM THE VALIDITY OF THE REGULATION, IS THE ENTIRELY DIFFERENT ISSUE: WHETHER THE EXPENDITURES WERE OR WERE NOT "ORDINARY AND NECESSARY" WITHIN THE LANGUAGE OF THE CODE. FINDING NO. 9 CLEARLY CANNOT BE CONSTRUED AS A FINDING THAT THE APPELLANTS FAILED TO MEET THE BURDEN OF SHOWING THAT SUCH EXPENDITURES WERE "ORDINARY AND NECESSARY".

The Finding referred to reads:

> "9. There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear. In any event, the measure was defeated."

The first sentence is clearly a finding by the Court that there was testimony that the Initiative "would have *affected* the wholesale business of Cammarano Brothers." The uncontroverted testimony referred to was that at least 90% of the wholesalers would have been put out of business. If the Court had stopped with that sentence in its finding, no question could have been raised in the opinion of this Court regard-

ing a failure to show that the Initiative affected the wholesale business of Cammarano Brothers.

The lower Court, however, went further in its finding, and, while admitting the business would have been affected, then stated that the manner in which it would have been affected was not made clear. The lower Court, next and in the concluding sentence of the finding, plainly indicated that in any event the effect upon the business was not a material issue to the case, stating: "In any event, the measure was defeated." The foregoing remark by the lower Court cannot be given any other significance because the question of whether the expenditures were deductible certainly would not turn on the defeat or enactment of the measure.

The record in the Court below from beginning to end clearly shows that the opinion of this Court misconstrues Fnding No. 9 and that the lower Court held that the Regulation barred the expenditures without need for further consideration of any alternate question in the case: whether the expenditures otherwise in fact were ordinary and necessary.

The Commissioner in his report denied the deduction on the sole ground that the expenditures were barred by the Regulation without making any further determination whether the expenditures otherwise were factually ordinary and necessary. (See first paragraph of this Court's opinion, p. 2.)

The Government, in the lower Court, at the outset admitted plaintiff's business would have been affected by enactment of the Initiative. Counsel for the Gov-

ernment in the Government's trial memorandum said: "Concededly, Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely." (TR 18.) That statement was a solemn judicial admission binding for all purposes in the case.

Thus, 5 Wigmore, *Evidence* (2d ed. 1923) declares: "An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a . . . *judicial admission,* . . . It is, in truth, a substitute for evidence, in that it does away with the need for evidence" (§ 2588). "The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, *i.e.,* the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it" (§2590). "A fact that is judicially admitted *needs* no evidence from the party benefiting by the admission" (§2591).

To the same effect is the statement by the Supreme Court in *Oscanyan v. Winchester R. Arms Co.,* 103 U.S. 261, 263 (1881) that: ". . . any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." [And See: *O. F. Nelson & Co. v. United States,* 149 F.2d 692, 694-695 (9th Cir. 1945)].

The Government subsequently in the trial sought to minimize the admission so made (TR 73-74). The effect of the admission, of course, could not be erased any more than any factual admission by a party to litigation can be subsequently withdrawn by his subsequent desire so to do [see: *State Farm Mut. Auto. Ins. Co. v. Porter,* 186 F.2d 834 (9th Cir. 1950)].

In its oral decision the trial Court stated: "The regulation flatly says that sums of money expended for the promotion or defeat of legislation are not deductible from gross income . . . It is admitted in the record that the sums here in question were spent by taxpayers for the purpose of defeating the enactment of certain legislation by initiative *and that being so, those sums are not deductible from gross income . . .* But that has nothing whatever to do with whether the sums so spent by the taxpayer are deductible for income tax purposes. *In that matter the Regulation is controlling and clearly requires judgment in favor of defendant.*" (TR 29, 30) (italics ours).

In Conclusion of Law No. 2 the trial Court said: ". . . But it is perfectly clear that the payment to the Trust Fund was entirely for propaganda, and aimed at the defeat of legislation. *For both of these reasons,* and without in any way condemning the stand taken in the campaign, the payment is not deductible under that Section, according to long standing Treasury Regulations . . ." (TR 47-48) (italics ours).

Thus, the lower Court, in accordance with the determination of the Commissioner, held likewise that the Regulation barred the expenditures without need

for making any further determination whether otherwise the expenditures factually were "ordinary and necessary."

Thus the equivocal comments found in Finding No. 9, when viewed in the light of the record, show that the lower Court rested its determination solely on the ground of the Regulation without considering any alternate issue.

The second and alternate ground of the opinion based on Finding No. 9 is erroneous for an additional and even more conclusive reason:

Section 23(a)(1)(A) of the Revenue Code permits a taxpayer to deduct "All the ordinary and necessary expenses" incurred in carrying on a business.

The Regulation purports to block out and bar certain types of expenditures as non-deductible without right on the part of the taxpayer to show that in fact such expenditures otherwise are ordinary and necessary.

Thus, if the Regulation may be validly applied to certain expenditures, the issue whether such expenditures in fact are ordinary and necessary becomes moot and unnecessary for determination.

On the other hand, if it is held that the Regulation cannot be validly applied to certain expenditures, then of course the second issue, whether the expenditures are in fact ordinary and necessary, must be resolved in order to justify a deduction.

The second and alternate ground of the opinion holds—even though the lower Court decided that the

Regulation was valid as applied to the expenditures in question and even though it was therefore unnecessary for the disposition of the case to determine whether such expenditures were in fact ordinary and necessary—that the lower Court nevertheless resolved such issue by reason of Finding No. 9 and therefore the opinion holds that Appellants failed to sustain the burden of proof in that respect.

The opinion states that the judgment of the lower Court must be affirmed apart from the question of the validity of the Regulation because Finding No. 9 is a finding that Appellants failed to sustain the burden of proof "that the passage of the initiative would have impaired its business as a beer distributor."

But such a finding is utterly without legal significance. The only prescribed issue that could be raised in the case—aside from the question of the validity of the application of the Regulation—is plainly the issue prescribed by the Code: whether the expenditures were "ordinary and necessary" in fact and whether Appellants did or did not meet the burden of proof on that issue.

A finding that Appellants failed to show that the enactment of the Initiative would have impaired their business certainly cannot be equated into a finding that Appellants failed to show that the expenditures were ordinary and necessary—the standard expressly provided for in the Code.

The Supreme Court in numerous decisions has defined the meaning of the words "ordinary and necessary."

"Ordinary" means "the response ordinarily to be expected" from a business man, *Commissioner v. Heininger,* 320 U.S. 467, 471 (1943); *Welch v. Helvering,* 290 U.S. 111 (1933). Thus the test is subjective and prospective—not objective.

"Necessary" means "appropriate and helpful" to the business—not indispensable, *Commissioner v. Heininger,* supra, at p. 471; *Welch v. Helvering,* supra, at p. 113.

The holding of the opinion that a taxpayer must show his business is impaired in order to justify a deduction of expenditures is clearly an erroneous statement of the law. If such were the law most business expenses, of course, would not be deductible. On the contrary the only showing required of a taxpayer—if the question is placed in issue aside from any regulation—is a showing that the expenditures were "ordinary and necessary" within the meaning of the Code section. According to the Supreme Court cases defining those words, such a showing is entirely different and certainly in no way commensurate with any drastic requirement that a taxpayer must show: that his business would have in fact been impaired.

The issue whether the expenditures are "ordinary and necessary" as prescribed by the Code and as defined by the Supreme Court decisions construing the Code, therefore, involves an entirely different standard than the narrow constricted standard and issue set forth in the opinion.

Hence, even if Finding No. 9 be construed in the manner stated in the opinion, it is without legal

significance because it contains no express finding that Appellants failed to show that the expenditures were "ordinary and necessary." The equivocal passing comment by the lower Court contained in Finding No. 9 cannot conceivably be construed as such a finding.

If the lower Court did pass on the issue whether the expenditures were in fact ordinary and necessary—which decision was unnecessary because the lower Court held the Regulation valid—then surely the lower Court should be required to make, and Appellants were entitled as of right to have the lower Court make: a clear cut finding that the Appellants failed to show the expenditures were in fact not "ordinary and necessary."

And in event such a finding were made, then Appellants should, of course, be afforded the right in both the lower Court and in this Court to attack such a finding as not supported by the evidence.

But Appellants have been denied that right in this case by reason of the alternate holding of the opinion. The Government in its brief on appeal nowhere raised or broached the point that Finding No. 9 should be construed as this Court has so construed it or that the expenditures in fact were not ordinary and necessary aside from the validity of the Regulation. Nor did Appellants, of course, so construe the Finding.

The contention that Finding No. 9 should be so construed was raised for the first time by this Court on its own initiative, in oral argument. Appellants were consequently caught by surprise.

Furthermore, the holding of the opinion in affirming the judgment of the lower Court on this second alternate ground is restricted solely to a construction of Finding No. 9 without any further consideration whatsoever of the question whether Appellants according to the record below failed to show that the expenditures were in fact "ordinary and necessary" and hence deductible.

On that issue Appellants urge that the record clearly shows that the expenditures were ordinary and necessary beyond question and as a matter of law.

The premises upon which that inescapable conclusion is based are as follows:

(1) Appellants admittedly were beer wholesalers.

(2) It follows that their customers must have been retailers otherwise Appellants could not have been wholesalers.

(3) The court must take judicial notice of the fact that under the laws of Washington then existing, the State of Washington was not engaged in the retail distribution of beer. Appellants' customers, therefore, must have been private firms and persons.

(4) Under the proposed Initiative all retail licenses of such private persons and firms would have been revoked and the retail sale of beer lodged exclusively in the State.

(5) Thus, had the Initiative been enacted, Appellants would have been deprived of all their existing customers and their existing method of doing business would have been destroyed.

Therefore, to say that the business would not have been impaired—entirely aside from the judicial admission of Government counsel to that effect—and that the expenditures so made in preserving the existing business were not "ordinary and necessary" would be directly contrary to the interpretation which the Supreme Court has placed upon the meaning of those words.

Commissioner v. Heininger, 320 U.S. 467 (1943) is squarely in point. There a mail order dentist's method of advertising through the mails was challenged by the Postmaster General. By reason of the imposition of a fraud order by the Postmaster General, taxpayer was prevented from advertising through the mails and thus from continuing his existing method of doing business. The Supreme Court in the strongest possible language held that the expenditures so incurred in defending taxpayer's existing method of doing business were ordinary and necessary beyond question. Thus the Supreme Court said: "So far as appears from the record *respondent did not believe,* nor under our system of jurisprudence *was he bound to believe,* that a fraud order destroying his business was justified by the facts or the law. *Therefore he did not voluntarily abandon the business but defended it by all available legal means. To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world."* (p. 472) (italics ours).

The fact that the dentist in the *Heininger* case was free to procure customers by different methods or to practice dentistry in some different or other form, of course, was immaterial. So here, the fact that Appellants might engage in some other or different form of business is likewise immaterial. The crucial fact here is that Appellants would have lost all of their existing customers; their existing method of doing business would have been destroyed. Furthermore, it was not necessary for Appellants to actually show that the business in fact would have been affected. The crucial test is: did Appellants in making the expenditures respond as an ordinary business man would have responded under circumstances where he *believed* his existing method of doing business to be threatened. The *Heininger* case clearly shows that the test is purely a subjective test based upon reasonable belief in making the expenditures and that expenditures made under such circumstances are ordinary and necessary beyond question.

This topic dealing with the deductibility of "ordinary and necessary" business expenditures—apart from the Regulation—may now be summed up as follows:

(1) The basic issue is whether the expenditures are "ordinary and necessary" within the express language of §23(a)(1)(A).

The issue is not as stated in the opinion whether the business would have been impaired.

(2) Since the basic issue is whether the expenditures are "ordinary and necessary," the correlative finding must be stated in the same express language.

A finding, as stated in the opinion, that taxpayers have failed to show the business would have been impaired is not a finding on or in any way commensurate with the requisite basic finding and issue whether the expenditures are "ordinary and necessary." Therefore the finding referred to in the opinion is without legal significance.

(3) Proof that a taxpayer incurred expenditures in defending his existing method of doing business in the belief that his business might be impaired and that his response in so doing was the response ordinarily to be expected from a business man is a modicum of proof sufficient to show that the expenditures beyond question and as a matter of law are "ordinary and necessary."

The opinion is in error in referring to actual impairment of the business as the issue whereas it is only one of many avenues of evidence and proof available to a taxpayer and relevant to the basic issue whether the expenditures are "ordinary and necessary."

Furthermore, even as to proof of impairment of the business—which proof Appellants contend, in any event conclusively shows that the expenditures are "ordinary and necessary"—affirmative evidence is not required that the business in fact would have been impaired, as stated in the Court's opinion. The only proof required is proof that the taxpayer *reason-*

ably believed, in the manner of an ordinary business man, that his business would be impaired and hence incurred the expenditures in defending it. Such is the holding of the Supreme Court in the *Heininger* case.

Appellants are most desirous of having the issue of the validity of the Regulation as applied to the instant expenditures presented squarely to the Supreme Court, free from any collateral issue involved in this Court's holding with respect to Finding No. 9. The Court's conclusion with respect to Finding No. 9 admittedly, according to the opinion, is an alternate ground for the Court's decision and hence is not necessary to the Court's ultimate decision in the case.

Appellants respectfully urge that: (1) The Second and alternate ground of the opinion relating to Finding No. 9 be stricken because it clearly contains erroneous statements of law and further because it is an alternate and unnecessary ground in support of the decision; or in any event (2) that the case be remanded to the lower Court for further proceedings on the issue and formulation of a finding whether the expenditures in fact were ordinary and necessary apart from the Regulation.

V.

REQUEST FOR REHEARING EN BANC.

Because of the importance of the decision in this case to the entire beer and brewing industry of the United States (the decision in this case being contrary

to the interpretation of the Regulation and practice heretofore followed by the Treasury in allowing as a deduction expenditures made under similar circumstances) and the importance of the decision to taxpayers in other industries similarly situated, and further because it is the purpose of Appellants to request the Supreme Court in any event to review any adverse decision in this case—for the purpose of clarifying the scope of the Regulation in light of the *Textile, Heininger,* and *Lilly* decisions of the Supreme Court—Appellants respectfully request not only that a rehearing be granted, but further that said rehearing be en banc.

Dated, San Francisco, California,
August, 1957.

Respectfully submitted,
ATHEARN, CHANDLER & HOFFMAN,
WALTER HOFFMAN,
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Attorneys for Appellants.

CERTIFICATE OF COUNSEL.

I, Walter Hoffman, attorney for Appellants herein, do hereby certify that the foregoing petition for a rehearing and for a rehearing en banc is presented in good faith, is in my judgment well founded, and is not interposed for delay.

WALTER HOFFMAN.

(Appendix Follows.)

Appendix.

Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, His Wife, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,350 July 8, 1957

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before: ORR, POPE, and FEE, Circuit Judges

ORR, Circuit Judge:

Appellants, partners in a wholesale beer distributing concern in Tacoma, Washington, made a contribution to the Washington Beer Wholesalers Association, Inc., Trust Fund. The Trust Fund had been established December 17, 1947, to carry on an extensive state-wide publicity program, directed by an Industry Advisory Committee, on behalf of wholesale and retail beer and wine dealers to defeat proposed initiative legislation in the State of Washington. The measure, if enacted into law, would have placed the retail sale of wine and beer exclusively in state owned and operated stores.[1]

The Association assessed its members amounts based upon their volume of business. The funds received from the contributions,

[1]The ballot title of the Initiative provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

appellants' contribution included, were used in an effort to defeat the initiative legislation.

On their income tax returns appellants claimed a deduction for the contribution made as an ordinary and necessary business expense within the meaning of § 23(a)(1)(A), Internal Revenue Code of 1939.[2] The Commissioner of Internal Revenue disallowed this deduction on the ground that the contribution was used for lobbying purposes and the promotion or defeat of legislation, and therefore within the prohibition contained in Treasury Regulations 111, § 29.23(o)-1, in force and effect at the time the payment was made. Following payment of the assessed deficiency and a claim for refund, this suit for refund followed.

The regulation reads:

Sec. 29.23(o)-1. *Contributions or Gifts by Individuals.*—

* * * * * * *

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

* * * * * * *

The field encompassing the force and effect of the lobbying regulation set out above has often been plowed; but there exists no straight furrow which leads unerringly to the proper solution of all cases. The regulation has quite often been held to preclude deductions made for moneys spent to defeat legislation.[3] Of course, the particular facts of each case govern.

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[2]Sec. 23 DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

(a) **Expenses.**—

(1) **Trade or Business Expenses.**—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * * *.

[3]See Textile Mills Corp. v. Commissioner, 1941, 314 U.S. 326; Sunset Scavenger Co. v. Commissioner, 9 Cir., 1936, 84 F.2d 453; Revere Racing Assn. v. Scanlon, 1st Cir., 1956, 232 F.2d 816; American Hardware & Eq. Co. v. Commissioner, 4 Cir., 1953, 202 F.2d 126, cert. denied 345 U.S. 814 (1953); Roberts Dairy v. Commissioner, 8 Cir., 1952, 195 F.2d 948, cert. denied, 344 U.S. 865 (1952).

Unquestionably the regulation is broad enough to exclude deuctions for any and all sums spent for lobbying and the promoon or defeat of legislation, and the Government insists that the ›urts have sustained the validity of the regulation in that broad nse. The case of Textile Mills Corp. v. Commissioner, 1941, 314 .S. 326, is relied on by the Government.[4] It is argued by ppellants, with some force, that *Textile Mills,* as an authority, ıould be restricted to the facts of that particular case, and that ıe ban against deductions of amounts spent for lobbying as rdinary and necessary expenses is valid only where they arise rom that family of contracts to which the law has given no nction." 314 U.S. at 339. However, other language in *Textile ills* characterizes the words "ordinary and necessary" as used the statute, as not being "so clear and unambiguous in their eaning and application as to leave no room for an interpretave regulation." 314 U.S. at 338. We think it may reasonably gathered from a reading of *Textile Mills* that the Commisoner, in segregating sums paid for lobbying as non-deductible ordinary and necessary business expenses, acted within the roper exercise of his rule-making power.

This court in the case of Sunset Scavenger Co. v. Commisoner, 9 Cir., 1936, 84 F.2d 455, decided prior to *Textile Mills,* eld that an association of scavengers in San Francisco could ot deduct expenses incurred in combatting an ordinance which ould have seriously affected their business. In its decision this urt relied on the doctrine of statutory re-enactment in the face a known administrative interpretation to sustain the lobbying gulation, as well as the latent ambiguity of the phrase, "ordiary and necessary business expenses."

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[4]In **Textile Mills,** the Supreme Court held that the expenses of lobbyg and propaganda, paid by a corporation employed by certain German xtile interests to secure legislation from Congress authorizing the reivery of German properties seized during the First World War, were ot deductible. The Court there related the lobbying regulation to ordiry and necessary business expenses, and rejected the contention that e limitation was not applicable to such expenses because it was inuded as a regulation under § 23(n), Internal Revenue Code of 1939, it was not specifically included as a regulation under § 23(a) of the ct.

In American Hardware v. Commissioner, 4 Cir., 1953, 202 F.2d 126, cert. denied, 346 U.S. 814 (1953), the regulation was applied to disallow deductions for payments by a hardware company to the National Tax Equality Association, which issued propaganda on the subject of tax revision. The court there held that *Textile Mills* controlled, rejecting contentions that *Textile Mills* was limited to the non-deductibility of items which are against public policy or are morally wrong, and that the lobbying regulation was inapplicable to ordinary business expenses since not specifically appended to § 23(a).

In Revere Racing Association v. Scanlon, 1 Cir., 1956, 232 F.2d 816, the regulation was again applied to disallow payments by a dog racing company for the defeat of a public referendum on the question of whether pari-mutuel system of betting at dog races would be continued in the county. There, the court rejected the contention that the regulation was inapplicable where the measure was before the people upon referendum, rather than before a legislature.

Appellants cite Commissioner v. Heininger, 1943, 320 U.S. 467 and Lilly v. Commissioner, 1952, 343 U.S. 90, both decided subsequent to *Textile Mills,* as limiting the scope of *Textile Mills* to payments violating public policy.

In Commissioner v. Heininger, a mail order dentist was allowed a deduction as ordinary and necessary business expenses for legal fees incurred in an unsuccessful contest of a fraud charge lodged by the Postmaster. In Lilly v. Commissioner, an optician was allowed business expense deductions for kick-backs to a prescribing physician, where the practice was customary.

Those cases are distinguishable in that the regulation here involved was not applicable; there was no lobbying involved. In Lilly v. Commissioner, the Supreme Court expressly distinguished *Textile Mills* on the ground that in the earlier case an interpretative regulation had been in effect for many years with Congressional acquiescence. 343 U.S. at 95.

This court in Sunset Scavenger v. Commissioner, 9 Cir., 1936, 84 F.2d 453, held that the doctrine of statutory re-enactment in the face of a known administrative interpretation applied in that case. We think that doctrine can be said to apply with equal

orce in the instant case.[5] What we have said sustains an affirmnce of the judgment, but there is also another reason which so requires an affirmance. The trial court found that:

"9. There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear. In any event, the measure was defeated."

This is a finding that appellants failed to sustain their burden establishing by a preponderance of the evidence that the ssage of the initiative would have impaired its business as a er distributor.

Judgment Affirmed.

(Endorsed:) Opinion. Filed July 8, 1957.

Paul P. O'Brien, Clerk.

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[5]The lobbying regulation assumed its present form in Article 562 of reasury Regulations 45 (1919 ed.), promulgated under the Revenue t of 1918, and has since appeared without change, in all successive gulations. See Article 562 of Treasury Regulations 45 (1920 ed.), 62, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924, and 26, Article 262 of Treasury Regulations 74 and 77 (1929 and 1937 s.), promulgated under the Revenue Acts of 1928 and 1932, Article (o)-2 of Treasury Regulations 86, promulgated under the Revenue Act 1934, Article 23(q)-1 of Treasury Regulations 94, promulgated under e Revenue Act of 1936, Article 23(o)-1 of Treasury Regulations 101, omulgated under the Revenue Act of 1938, Sections 19.23(o)-1, .23(o)-1, and 39.23(o)-1 of Treasury Regulations 103, 111, and 118, spectively, promulgated under the Internal Revenue Code of 1939, and ction 1.162-15 of the proposed Income Tax Regulations under the Inrnal Revenue Code of 1954.